involves moving the end user from one carrier to another. It is synonymous with "switch as is," it is pertinent only to a resale environment, and, therefore, he asserts, the NRCs for the loop and port combination should be priced at the resale rate.

BellSouth witness Caldwell identifies the work center activities, LCSC and ACAC for the port and LCSC, Network Services, and RCMAG for the loop, as necessarily involved migration activities, given the working assumption that the migration of an existing BellSouth customer to either MCIm or AT&T can be accomplished without separating the loop and port combinations. While BellSouth witness Caldwell provides estimated values for these cost components, we note that BellSouth did not actually develop NRCs for migration as we have defined it in this proceeding. Asked to make a cost comparison of the loop and port ordered individually and in combination, witness Caldwell testifies that the only cost savings when a loop and port are ordered in combination rather than individually is a reduction in the ACAC work time.

The work activity associated with the ACAC (JFC 471X) is the coordination of the service turn-up and the turn-up testing. According to witness Caldwell, BellSouth's proposed fallout resolution costs associated with the LCSC (JFC 2300) are based on a fallout rate of 20 per cent, with a fallout resolution time of 15 minutes.

AT&T witness Walsh states that BellSouth's proposal assumes a disconnection and a reconnection. Witness Walsh states that for the reconnection, BellSouth requires a separate order for the loop and a separate order for the port. In this circumstance, witness Walsh explains that there is a charge to disconnect the loop and a charge to disconnect the port, and further charges to reconnect them. BellSouth also proposes to collect, up front, charges for future disconnection of these elements. Witness Walsh further states that BellSouth's OSSs are set up so that when a request involving a loop and port is received, they would assign the nearest loop and port. He argues that there is no reason why this cannot be done on one service order within BellSouth's present provisioning system.

Differing with witness Landry, MCIm witness Hyde states that there is no technical reason why BellSouth cannot use the existing telephone number identifier for the loop so that it can be processed by non-access billing systems on the same service order with the port. We believe that BellSouth can use the same telephone number previously assigned to the loop without having to

break apart the loop and port combinations for processing purposes. As we have noted, each of the agreements requires that currently combined elements remain connected. Therefore, we find that BellSouth shall be required to process each loop and port combination ordered on a single service order as one service order, without breaking apart the existing loop and port combination and thereby requiring AT&T or MCIm to recombine them at a collocation facility.

AT&T witness Falcone states that BellSouth's collocation proposal is inconsistent with the Act as interpreted by the Eighth Circuit. He notes that AT&T's "recent change" process for a loop and port combination only involves reprogramming the switch to recognize that an ALEC is now the carrier for billing purposes. According to witness Falcone, the switch records the customer's local and access usage data for billing purposes. Therefore, he argues, the cost associated with the migration of an existing BellSouth customer should only involve "processor time to reflect the change in who is serving the customer, and to activate different billing systems to reflect the use of unbundled network elements by the [A]LEC." Even with a collocation facility in place, witness Falcone states that AT&T is not going to win over many customers if they have to be told that they may be out of service during "cut over" for periods as extended as four hours.

In staff witness Young's review of the staff's audit of BellSouth's non-recurring cost study, she states that:

> [Witness Caldwell's] schedules ... do not represent the migration of an existing BellSouth customer ... BellSouth's definition of migration is resale. It appears that the ... schedules assume that the loop and port have to be separated to be provided to the [ALEC].

Witness Young states that each BellSouth subject matter expert interviewed in the audit stated the BellSouth non-recurring cost study did not address migration.

Based on the evidence in the record, we conclude that BellSouth's collocation proposal is unnecessary for the migration of an existing BellSouth customer. We conclude further that BellSouth's proposal to break apart loop and port combinations that are currently connected, requiring AT&T or MCIm to establish a collocation facility where the unbundled loop and the unbundled port would be recombined, is in conflict with the terms of the

parties' agreements and the Act as interpreted by the Eighth Circuit. Iowa Utilities Bd. I, 120 F.3d at 814. Moreover, we find that BellSouth's proposal does not address the migration of an existing BellSouth end user. Hence, we reject it.

Commission Approved Nonrecurring Charges for the Migration of an Existing BellSouth Customer Without Loop and Port Separation

We have found that BellSouth's NRC study does not address migration. MCIm's NRC study is based on today's technology. AT&T's NRC study is based on totally forward-looking, best-available technology. Based on the evidence in the record, we find it appropriate to base our approval of NRCs for the loop and port combinations in issue on today's technology. BellSouth's basis is inapplicable to migration and AT&T's basis is presently unrealistic.

Most of the evidence in this record related to fallout rates on which AT&T and MCIm rely is based on service resale. BellSouth's proposed fallout rate of 20 per cent is based on ordering individual UNEs, rather than combinations of UNEs. We note that this proceeding is specific to the migration of loop and port combinations already in place. We believe it is not reasonable to assume that fallout rates will improve markedly over the life of these agreements. Nevertheless, we believe on the basis of this record that the fallout rate for combination orders will be greater than the fallout rate for resale, but significantly less than the fallout rate for individual UNE orders. This assessment is based on the nature of each of the provisioning processes as developed in this record. MCIm proposes a three per cent fallout rate based on BellSouth-specific evidence that indicates that three per cent is the best fallout rate that can be obtained in the resale environment. Given the range of three per cent to 20 per cent, we find that a fallout rate of five per cent is reasonable for the migration of loop and port combination orders in which the elements are already combined, and we approve it.

Having determined the fallout rate to be reasonably expected, we next determine the work time reasonably necessary to resolve the fallout. BellSouth and MCIm both estimate 15 minutes, and AT&T estimates 17 or 17.5 minutes. We give somewhat greater weight to BellSouth's estimate in light of its experience with fallout resolution. Accordingly, we find it reasonable to approve a fallout resolution time of 15 minutes.

BellSouth and MCIm propose the same work time of 0.0250 hour for manually performing the switch translations for each loop and port combination. AT&T does not propose a work time for performing the actual switch translations because it believes this should be performed electronically. Upon consideration, we find 0.0250 hour to be reasonable for manually performing switch translations for each loop and port combination, except the 2-wire ISDN loop and port combination, and we therefore approve it. We find that a work time of 0.0667 hour for the 2-wire ISDN loop and port combination, as proposed by BellSouth, is reasonable, and, upon consideration, we approve it.

AT&T proposes the use of fully loaded labor rates based on a provider employing best available forward-looking technology. They fall below the BellSouth rates MCIm proposes for use. In our belief, these are unrealistic and unsuitable for present purposes. MCIm proposes the use of direct labor rates which are equal to BellSouth's partially loaded direct labor rates less consideration of shared and common costs and an allowance for profit. Upon consideration, we find that these rates are reasonable and we approve them for determining NRCs in this proceeding.

AT&T and MCIm both argue that an up-front disconnection charge should not be imposed, but imposed rather at the actual time of disconnection. Upon consideration, we agree. Eliminating disconnection costs from up-front NRCs is a reasonable way to relieve some of the burden associated with high start-up (non-recurring) costs.

We agree with BellSouth and MCIm that there are designed service activities associated with the ISDN and DS1 loop and port combinations. BellSouth, however, only provided estimated work times, assuming the migration of an existing BellSouth customer can be accomplished by means of the loop and port combinations at issue in this proceeding. AT&T does not propose to include designed service activity. Upon consideration, we find that MCIm's proposed designed service work times are reasonable, and we approve the use of them for purposes of this proceeding.

We also find that in cases not involving designed services, where fallout does not occur, and when electronic "recent change" translation is available, the time to migrate an existing BellSouth customer to an ALEC, that is to say, changing the presubscribed local carrier (PLC) code, is equal to the time it takes BellSouth to migrate a customer to an IXC by changing the PIC code.

Upon review of the evidence in this record, we approve the non-recurring work times and direct labor rates shown in Table I for each loop and port combination in issue in this proceeding for the migration of an existing BellSouth customer to AT&T or MCIm without unbundling. We furthermore approve the resultant NRCs shown in Table II.

Table I

Commission-Approved
Non-recurring Work Times and Direct Labor Rates
for
Loop and Port Combinations

Function	JFC	Installation (Hour)		Direct Labor Rate
		First	Add'l	
LCSC	2300	0.0125	0.0000	$42.09
RCMAG[1]	4N1X	0.0250	0.0250	$37.34
ACAC[2]	471X	0.0019	0.0019	$38.26
CPG[2]	470X	0.0040	0.0000	$36.25
SSIM[2]	411X	0.0075	0.0050	$42.96

[1]For the 2-wire ISDN loop and port combination we approve an RCMAG work time of 0.0667 hour for first and additional installations.
[2]These functions are pertinent only to the DS1 4-wire loop and port combination.

Table II

Commission-Approved
Non-recurring Charges
for
Loop and Port Combinations

Network Element Combination	First Installation	Additional Installations
2-wire analog loop and port	$1.4596	$0.9335
2-wire ISDN loop and port	$3.0167	$2.4906
4-wire analog loop and port	$1.4596	$0.9335
4-wire DS1 loop and port	$1.9995	$1.2210

III. CONCLUSION

We have conducted this proceeding pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of Section 251, the provisions of the FCC's implementing rules, and the applicable provisions of Chapter 364, Florida Statutes.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the provisions of the interconnection agreement entered into by MCImetro Access Transmission Services, Inc., and BellSouth Telecommunications, Inc., related to pricing of combinations of unbundled network elements are to be construed as set forth in Part II.B.1 of this Order. It is further

ORDERED that the provisions of the interconnection agreement entered into by MCImetro Access Transmission Services, Inc., and BellSouth Telecommunications, Inc., related to switched access

usage data are to be construed as set forth in Part II.B.2 of this Order. It is further

ORDERED that the provisions of the interconnection agreement entered into by AT&T Communications of the Southern States, Inc., and BellSouth Telecommunications, Inc., related to pricing of combinations of unbundled network elements are to be construed as set forth in Part II.C.1 of this Order. It is further

ORDERED that the provisions of the interconnection agreement entered into by AT&T Communications of the Southern States, Inc., and BellSouth Telecommunications, Inc., related to switched access usage data are to be construed as set forth in Part II.C.2 of this Order. It is further

ORDERED that non-recurring charges for 2-wire analog loop and port combinations; 2-wire ISDN loop and port combinations; 4-wire analog loop and port combinations; and 4-wire DS1 loop and port combinations are approved as set forth in Part II.D.2 of this Order. It is further

ORDERED that the parties to this proceeding shall be required to negotiate on their initiative what competitive local telecommunications services provisioned by means of unbundled access, if any, constitute the recreation of the incumbent local exchange carrier's retail service. It is further

ORDERED that the parties shall submit written agreements memorializing and implementing our decisions herein within thirty days of the issuance of this Order. It is further

ORDERED that the agreements shall be submitted for approval in accordance with Section 252(e)(2)(b) of the Telecommunications Act of 1996. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 12th day of June, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

CJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).

ATTACHMENT 30

4/30

R Lucthers
cc: Karen I,

Service Date: April 30, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF The Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc.	))))))	UTILITY DIVISION DOCKET NO. D96.11.200 ORDER NO. 5961d

* * * * *

ORDER ON SUPPLEMENTAL DISPUTED ISSUES

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INTRODUCTION AND BACKGROUND

This proceeding began with a request on November 22, 1996 from AT&T Communications of the Mountain States, Inc. (AT&T) for the Montana Public Service Commission (Commission) to arbitrate pursuant to 47 U.S.C. § 252(b). AT&T had been unable to negotiate all the terms and conditions of interconnection with U S WEST Communications, Inc. (U S WEST) and requested Commission arbitration of the unresolved issues.

The Commission held an arbitration hearing from February 4 through February 14, 1997, and issued its Arbitration Order, Order No. 5961b, on March 20, 1997. Both AT&T and U S WEST petitioned for reconsideration of parts of the Commission's arbitrated decision. The Commission issued its Order on Reconsideration, Order No. 5961c, on July 9, 1997, directing the parties to file a single agreement incorporating the decisions from both orders within 45 days of service of the Order on Reconsideration.

On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued its decision in Iowa Utils. Bd., et al. v. FCC, 120 F.3rd 793 (8th Cir., 1997), *amended on reh'g,* 135 F.3d 535 (Oct. 14, 1997), *cert. granted, sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 683 (1998). This order amending the Court's earlier opinion affected the Commission's decision. Despite the opinion, the parties filed a single agreement on September 4, 1997. However, the agreement was not executed and it included numerous provisions setting forth both sides of issues which arose following the Eighth Circuit's opinion. It also included other issues which arose between the parties from their negotiations following the Eighth Circuit opinion and the Commission's arbitrated decision.

The parties represented to the Commission with the September filing that the juxtaposed language in their unsigned agreement was their respective final proposed language on each remaining unresolved issue. The parties have requested the Commission to decide these issues before they execute their interconnection agreement. Some of these issues were thought to be resolved before the first order in this matter was issued by the Commission.

Shortly after the parties filed their agreement, AT&T asked the Commission for a meeting to present further information explaining many of the still-unresolved issues, stating that this had been done in other U S WEST states. The Commission directed its staff to meet informally with the parties' representatives. This meeting took place on September 25, 1997. Although the parties used this meeting to further explain numerous issues, any information that might be characterized as additional evidentiary information presented by the parties at that time is not used as support for any of the Commission findings in this Order.

The Eighth Circuit reconsidered and clarified its July 18, 1997 opinion in its Order on Petitions for Rehearing dated October 14, 1997. Notably, the Court vacated the Federal Communications Commission's (FCC) rule 51.315(b) which prohibited incumbent LECs from separating existing network element combinations. The parties requested the opportunity to file additional briefs to address the effect of the October 14 order on the network element combination issues still pending before the Commission.

The Commission's decisions are based upon the legal arguments made by the parties in their briefs, the applicable FCC orders and regulations, and upon the record as it existed as of the close of the arbitration hearing on February 14, 1996. The record includes no other evidentiary-type materials presented or available to the Commission subsequent to that hearing.

The Commission's resolution of these additional issues is guided by the provisions of the Telecommunications Act of 1996[1] and the rules developed by the FCC pursuant to the 1996 Act. Where differing results might be acceptable under the 1996 Act, we may also be guided by Montana law and Commission regulations. In addition, we do not consider issues that appeared to be resolved by compromise or otherwise during the informal meeting held on September 25, 1997.

COMMISSION DECISION

A. Part A

1. Issue No. A-1: Combinations - Part A, Definitions, p. 6; Virtual Collocation - Part A, p. 36, Section 40.2.1; Recitals section, Fourth *Whereas* - Part A; Attachment 3 - p. 1, 2, and 4, Section 1.2.2, Section 2.5, and Section 3.3; and Attachment 5 - p. 17, Section 3.2.15.1

1. After the Eighth Circuit issued its July 18, 1997 decision in Iowa Utils. Bd., the parties' interpretations of the Court's holdings differed dramatically. The Court's initial opinion and its October 14, 1997 order on rehearing invalidated certain FCC rules requiring the incumbent local exchange carriers to combine elements for competitive carriers and to provide elements in existing combinations. The Act and the Iowa Utils. Bd. opinions provide the following framework: (1) U S WEST must provide AT&T with access to unbundled network elements (UNEs); (2) AT&T can purchase any or all of the network elements it needs as unbundled elements; (3) U S WEST need not combine unbundled elements for AT&T, but U S WEST must provide the access to U S WEST's network that AT&T needs in order to recombine

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

the unbundled elements; and (4) although the FCC rule prohibiting the disassembling of currently combined elements (47 C.F.R. § 315(b)) has been vacated, the Act does not prohibit the sale of unseparated components as part of unbundled network elements.

2. U S WEST's advocacy in the pre-arbitration portion of this proceeding and throughout the arbitration hearing and post-hearing briefing period was consistent: U S WEST argued that there must be a "rebundling" charge[2] equal to the difference between the resale price and the unbundled element price, thereby making the charge the same for unbundled elements of a particular service as for resale of that service. The Commission accepted U S WEST's argument and determined that the price for unbundled elements should include the rebundling charge advocated by U S WEST--at least until permanent prices are developed.

3. U S WEST now contends that the Eighth Circuit's rejection of the rule preventing an incumbent LEC from separating network elements that it currently combines means that the interconnection agreement cannot require U S WEST to provide any elements in a combined state to AT&T. U S WEST further contends that it may sever existing connections between elements and require AT&T to recombine the elements inside a collocated cage in U S WEST's central office or, if no space is available, by virtual collocation.

4. According to AT&T, the FCC's Third Order on Reconsideration[3] stated that such actions by an incumbent local exchange carrier (ILEC) would impose costs on competitive local exchange carriers (CLEC) that the ILEC would not incur, and thus would violate the requirement

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[2]This has also been referred to as a "glue" charge.

[3]Third Order on Reconsideration, 12 F.C.C.R. 12460, CC 96-98, FCC 97-295 (rel. Aug. 18, 1997).

under § 251(c)(3) of the Act that ILECs provide nondiscriminatory access to unbundled elements. AT&T further asserts that although the Eighth Circuit ruled that a new entrant may achieve the capability to provide telecommunications services completely through access to unbundled elements, U S WEST inconsistently proposes to require AT&T to recombine the network elements it purchases while refusing to grant the access to its facilities that would be necessary with such a requirement.

5. U S WEST's proposed contract language would require all CLECs to own or control facilities to access unbundled elements. U S WEST would require CLECs to collocate equipment in U S WEST's central offices. U S WEST proposes to then unbundle elements that it has provided in combination and require each CLEC that wishes to provide services through unbundled elements to connect to the individual unbundled elements by use of cross-connects between U S WEST's facilities and the CLEC's facilities. If no space is available for a CLEC to do this, then U S WEST would require the CLEC to use virtual collocation to accomplish the element combinations required.

6. However, U S WEST states that it will not combine elements for a CLEC when the CLEC wishes to provide service via virtual collocation. Virtual collocation does not contemplate that a CLEC has access to its own collocated equipment; rather, the ILEC performs all functions for the CLEC with this arrangement. U S WEST's position on this begs the question: If there is no room to physically collocate, how is the CLEC going to physically locate the "cage" in which it will make its cross-connections? The simple answer is that the CLEC will not be able to combine unbundled elements at all and virtual collocation could only be used for pure facilities-based interconnection.

7. AT&T states that U S WEST's proposed resolution of this issue would delete all language in the juxtaposed agreement that deals with combinations. It argues that it is impossible for an interconnection agreement to be complete or to comply with the requirements of the 1996 Act unless it clearly and unambiguously describes how AT&T will be allowed to provide services through combinations of UNEs. It further argues that if the Commission determines that AT&T must combine elements that U S WEST has torn apart, the interconnection agreement must specifically provide: (1) how AT&T will have access to U S WEST's network to obtain and combine UNEs; and (2) the terms and conditions (including price) under which the UNEs will be available. According to AT&T's argument, it is not enough to simply delete provisions from the agreement which require U S WEST to provide elements in existing combinations; it is critical that the agreement contain details of combining and recombining, specific prices, and other particulars for implementation. AT&T states that the agreement as it now exists contemplated that U S WEST would provide UNEs in combination if requested by AT&T; therefore no provisions have been included for U S WEST to uncombine and AT&T to combine elements, and no information to provide for AT&T to gain access to U S WEST's network to accomplish the combination of elements U S WEST chooses to separate. According to AT&T, this would render the agreement fatally incomplete, create significant barriers to entry, and is contrary to the 1996 Act.

8. AT&T further asserts that the sole purpose of U S WEST's present intent to separate elements is to impose additional, artificial costs upon new entrants and their customers and to subject them to service outages of indefinite duration while the incumbent disconnects and the new entrant reconnects network elements that were already connected to each other. In

addition, AT&T argues that this Commission should not permit U S WEST to engage in such "blatantly anticompetitive conduct"--conduct which would violate Montana's prohibition on discriminatory and unreasonable conduct by carriers in § 69-3-321, MCA. It states that the sole purpose and effect of such conduct would be to impose costs on CLECs that U S WEST does not incur, and to ensure that new entrants competing through the purchase of UNEs are unable to provide service at parity with U S WEST.

9. AT&T argues that nothing in the federal Act or Montana law prohibits the Commission from adopting and enforcing under state law any duties that go beyond the minimal and non-exclusive requirements of the Act. It further states that, having successfully argued that state commissions have authority over the pricing rules for UNEs used to provide local service, U S WEST cannot now argue that the Commission lacks authority under 47 U.S.C. § 261(c) to impose additional requirements on U S WEST for the provision of UNEs to further competition. AT&T also cites § 601(c) of the Act as stating that the Act may not be construed to modify, impair, or supersede state or local law unless expressly provided in the Act or any subsequent amendments to the Act. AT&T argues that U S WEST should not be able to successfully contend now that any rule authorized by state law prohibiting it from separating network elements that are already combined is somehow preempted by the Act, when it has relied on these and other sections of the Act to preserve substantial state authority.

10. AT&T argues that a state requirement that imposes a more demanding and pro-competitive requirement on U S WEST than the federal Act does not conflict with the Act, but rather, it reasonably supplements U S WEST's obligations in a manner that complements the purposes of the federal Act. Such a state requirement would only hasten accomplishment of the

Act's primary objective which is to introduce competition into local exchange markets and erode the existing monopolistic nature of the industry. AT&T asserts that the Eighth Circuit has made it abundantly clear that the federal government has a limited role and the states have a significant role in the regulation of local exchange service.

11. The Eighth Circuit did in fact emphasize the significant and substantial role of state commissions under the 1996 Act. The Court stated that § 251 does not apply to state statutes or regulations that are independent from the 1996 Act and noted further that many states had opened local telephone markets to competition prior to the 1996 Act and that § 251(d)(3) was designed to preserve such work of the states. Iowa Utils. Bd., 120 F.3d at 806-07. The Court stated,

> With subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of Part II.

Id., at 807.

12. Montana's markets have always been open to competition. Even before the 1996 Act, pro-competitive statutes had long been in effect that required interconnection and structure sharing. *See, e.g.*, 69-6-101, MCA (repealed in 1997, after Congress passed the Telecommunications Act of 1996). Moreover, the Montana Legislature adopted a pro-competitive stance before the federal Act was enacted. *See, e.g.*, §§ 69-3-801 and 69-3-809, MCA.

13. U S WEST is unwilling to allow CLECs access to its network in any manner except by collocating equipment, which the Court expressly stated CLECs are not required to do. U S WEST's proposed contract terms would require AT&T to recombine elements that it has

chosen to unbundle, without permitting AT&T access to the elements to recombine them. It has taken the Eighth Circuit rulings to an illogical extreme. U S WEST cannot have it both ways--either it permits CLECs to purchase combined elements or it permits access to its network so that CLECs can perform the combinations, without requiring collocation.[4]

14. The record in this proceeding contains no evidence from which the Commission can determine that U S WEST will fulfill its obligation to provide AT&T with access to its network. The Eighth Circuit's July 18, 1997 opinion states that a CLEC who orders UNEs "is entitled to gain access to all unbundled elements that are sufficient, when combined by the requesting carrier, to enable the requesting carrier to provide telecommunications service." Iowa Utils. Bd., 120 F.3d at 815. The Court further stated that, "The fact that the ILECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them. Id., at 813. The materials before this Commission do not support the Court's conclusion.

15. The arguments that have been made in this proceeding do not demonstrate that U S WEST is willing to permit this access. U S WEST's advocacy is that CLECs can only obtain access to UNEs by collocating equipment in each central office that a CLEC wants to provide service from. Collocating a "cage" and the accompanying cost of connecting with U S WEST's network in every central office and by every CLEC is likely to be quite costly to new

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[4]Briefing by both parties in December 1997 to address the effect of the Eighth Circuit's October 14, 1997 ruling discusses alternatives to the dilemma created in this proceeding. AT&T suggests several alternatives to physical collocation and virtual collocation; U S WEST attached recent correspondence between the parties which refers to a Single Point of Termination (SPOT) method. However, the substance of the parties' arguments for alternatives is not part of the record and cannot be considered by the Commission at this time.

entrants and perhaps to U S WEST as well. Every CLEC wishing to use UNEs will have to collocate its own equipment in each U S WEST central office serving area the CLEC wishes to serve. This will drive up the cost for CLECs to provide service in competition with the ILEC and may constitute a barrier to CLEC entry, which this Commission cannot support.

16. Not only will CLECs incur additional costs which could be avoided, U S WEST will incur costs to unbundle combinations so that the CLEC can make its own combinations. It will incur further costs to recombine elements if the CLEC's customer returns to U S WEST, as will the CLEC to unbundle the elements from its connections. It makes little economic sense to require the CLEC to invest this heavily to enter the market. The use of UNEs to gain market entry should fulfill the goals of federal and state law to encourage competition; it should not have the effect of establishing a barrier to entry for the CLECs.

17. The Commission must ensure that its decision is consistent with the goals and policies of the federal Act and Montana law. We conclude preliminarily that the agreement should set forth detailed procedures for AT&T to obtain access to unbundled elements--procedures that do not conflict with the stated purposes in the Montana Telecommunications Act (MTA) to maintain universal service availability at affordable rates and to encourage competition in all telecommunications markets. Section 69-3-802, MCA. Absent such procedures, it is reasonable to restrict U S WEST from disassembling existing UNE combinations.

18. The Eighth Circuit orders preclude a CLEC's acquisition of already combined elements at cost-based rates. The Court stated that such would "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunica-

tions retail services for resale on the other." Iowa Utils. Bd., Order on Petitions for Rehearing, 135 F.3d 535, 1997 U.S. App. LEXIS 28652, at **3-4, *amending initial decision reported at* 120 F.3d at 813 (Oct. 14, 1997). U S WEST argues this holding also confirms that forcing it to combine UNEs for AT&T at cost-based rates undermines the distinction between resale and UNE pricing created by the Act and bars the Commission from imposing a state law requirement that U S WEST combine UNEs for AT&T. U S WEST further argues that any rule that prohibits an ILEC from separating network elements that it may currently combine is contrary to § 251(c)(3) and cannot stand. Therefore, according to U S WEST, the Commission cannot invoke state law authority to take action inconsistent with § 251 because any Commission decision imposing the vacated combination requirement would conflict with the 1996 Act and is preempted by the Act.

19. We disagree. U S WEST's argument is contrary to the Eighth Circuit's holding that CLECs can provide services entirely through the ILEC's unbundled elements without owning or controlling any of their own facilities. Although the FCC's rule prohibiting the disassembling of currently combined elements has been vacated, U S WEST must provide access to its network to enable AT&T to recombine elements, and it may not do so in such a way as to discriminate against other competing providers or to create anticompetitive barriers to entry.

20. U S WEST's position is also inconsistent with its prior argument in this Docket that the Commission should permit it to charge a "rebundling charge." The Commission accepted U S WEST's argument that the price for unbundled elements should include a rebundling charge--at least until permanent prices are developed. The Eighth Circuit precludes CLECs from acquiring UNEs at cost-based rates. The rebundling charge, advocated by

U S WEST and adopted by the Commission in the Arbitration Order, ensures that AT&T will not acquire UNEs at cost-based rates. Requiring U S WEST to provide UNE combinations only if paid a rebundling charge by the CLEC is not inconsistent with the Eighth Circuit's opinion.

21. Therefore, based on the parties' representations, the applicable state and federal law as discussed above, and the Commission's analysis of the issue presented, the following adjustments to the parties' agreement should be made:

a. Definition of Combinations (Part A, p. 6, Definitions Section): The definition is not consistent with the Eighth Circuit's October 14, 1997 decision on rehearing. It should either be deleted or clarified to state that U S WEST has no obligation to combine UNEs unless it refuses to allow AT&T sufficient access to its network--consistent with this Order--to make the combinations of elements necessary to provide the service to its customers.

b. Virtual Collocation (Part A, p. 36, Section 40.2.1): U S WEST's position on combining UNEs is inconsistent with the definition of "virtual collocation," with which AT&T would have no access to the facilities to physically combine UNEs. U S WEST's proposed language denying its obligation to combine UNEs should be revised to clarify that if AT&T does not have sufficient access to virtually collocated equipment used to combine UNEs, U S WEST shall perform the combination.

c. Recitals section, fourth *Whereas* (Part A, p. 87[5]): AT&T's proposed phrase should be deleted to conform to the Eighth Circuit's decision on rehearing. For further clarity the entire phrase "separately or in any combination" should be deleted.

d. Attachment 3 (p. 1, Section 1.2.2): U S WEST's proposed language is adopted; AT&T's proposed provision is inconsistent with the Eighth Circuit's decision on rehearing. The provision should include a statement reflecting the Commission's decision that existing combinations will not be unbundled unless the parties negotiate an amendment that provides for AT&T to gain access to U S WEST's network for purposes of combining elements.

e. Attachment 3 (p. 2, Section 2.5): AT&T's proposed term relating to the demarcation point is rejected as inconsistent with the Eighth Circuit's decision on rehearing.

f. Attachment 3 (p. 4, Section 3.3): AT&T's proposed language on combinations and the reference to provision of better service than U S WEST provides itself should be deleted. U S WEST must only provide services at parity to that which it provides itself, its affiliates, or any other third party.

g. Attachment 5 (p. 17, Section 3.2.15.1): The Commission is unclear what the intent is for this provision. The "combination" language is inconsistent with the Eighth Circuits decision on rehearing and should, therefore, be deleted. The provision should include a statement reflecting the Commission's decision relating to existing combinations, which will not

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[5]This page is numbered as "87" in the second draft provided to the Commission. In the first draft, numerous references were to "Utah" instead of Montana, and the page was numbered as "2" (there were two pages numbered as "2" in the first draft).